No. 2696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

On October 11th, 1912, an indictment was presented in the District Court of the United States for the Northern District of California, First Division, charging J. F. Wetzel, the Plaintiff in Error in three counts with a violation of Section 211 of the Criminal Code, a re-enactment of Section 3893 of the Revised Statutes. (Tr. of Rec. 2, 3, 4, 5 and 6.) The counts all refer to one and the same "written letter and notice" and to but one deposit in the postoffice establishment.

The defendant came into court, represented by counsel and moved to quash the indictment upon the grounds that it was apparent on its face that it charged the defendant three times with one and the same identical offense. (Tr. of Rec. 7.) Upon this motion being denied (Tr. of Rec. 8) the position taken by the defendant was supported by a motion to require the United States to elect upon which of the three counts it would proceed against him. (Tr. of Rec. p. 8.) The Court took no action upon this motion.

On the 23rd of December, 1912, the defendant demurred to the indictment and to the whole thereof and to each and every count therein—both generally and specially and on the same day argued the questions raised thereby and submitted them in open court before Judge Van Fleet. (Tr. of Rec. pp. 16-7.)

The original record in the District Court and this printed record does not show that the Judge ever acted upon the demurrer. (See Minutes of Trial, Tr. of Rec., end of p. 19 and beginning of p. 20; also see Engrossed Bill of Exceptions, Tr. of Rec. p. 25.)

After the submission of the demurrer nothing further was done in the case for nearly two years. On September 21st, 1914, the defendant again came into court with a motion to compel the Government to elect upon which of the counts the defendant would be tried, which motion was submitted to the

Court, Judge Dooling presiding, and was by him denied (Tr. of Rec. 17-18), to which denial defendant excepted, which exception was entered and allowed. (Tr. of Rec. p. 24.)

On September 29th, 1914, the case was called and proceeded to trial. (Tr. of Rec. 19, 20, 21 and 22.) After the jury was sworn it appeared that the demurrer to the indictment was still pending, whereupon the Court overruled the same. To fully understand what here occurred it will be necessary to read the Bill of Exceptions (Tr. of Rec. 24, 25 and 26) in connection with the Minutes of the Trial. Before entering his plea the defendant with the consent of the Court moved *ore tenus* to quash the indictment upon the same grounds urged on his former motion to quash—which motion was denied and an exception taken by defendant was entered and allowed. The defendant then pleaded "Not Guilty", but before any other steps were taken, with the consent of the Court he again moved for an order compelling an election between counts. The Court denied the motion and an exception was taken, noted and allowed. The trial then proceeded and resulted in a general verdict of Guilty and in a verdict that finds the defendant guilty on each of the three counts. (Tr. of Rec. 23.)

After the verdict the defendant moved for a new trial which was granted as to the first count in the indictment and denied as to the second and third

counts. (Tr. of Rec. pp. 29 and 31.) A motion in arrest of judgment was also made and denied (Rec. 30-31), and on April 15th, 1915, judgment on the verdict of guilty was pronounced and entered (Tr. of Rec. 32).

There being no further remedy in the District Court the defendant assigned certain errors (Tr. of Rec. pp. 35 to 38) and sued out a Writ of Error upon which the case is now before this Court.

Argument.

Two grave questions of law, both involving the right of the defendant to a fair indictment under the Fifth Amendment to the Constitution of the United States are here presented.

Like Frisbie's case this case comes before this Court upon the indictment alone.

Frisbie vs. *U. S.*, 157 U. S. 160.

We believe it to be waste of ink and paper to argue the fundamental proposition that the right to a proper and dignified indictment is not a mere privilege of a man accused of crime but that it is a right incidental to his liberty and is anchored to the Fifth Amendment. We merely state the above to be the law of the land and proceed to our discussion, taking up separately the two questions involved.

Argument on Motion to Quash and Motion to Compel Election.

Our first claim is that the indictment in the case at bar deliberately charged the defendant Wetzel three times with the identical offense. There is no doubt but that under Section 211 of the Criminal Code (R. S. 3893) the mailing of a letter containing the prohibited matter is an offense against the law and that an offender may be indicted and punished. If an offender mailed two letters the indictment may accuse him twice, in separate counts, as in Burton's case, cited below, and upon conviction he may be punished twice. Stated differently, it is the plain intention of the statute to make the mailing of a letter which carries prohibited matter a crime—punishable once and once only.

One of the highest privileges possessed by an accused is the right to plead guilty if the facts justify his doing so, and to throw himself upon the mercy of the Court. Such a course is sound in morals, in law and is undoubtedly the soundest public policy. One who has voluntarily violated the law of his country can more easily rectify his wrongdoing by the plea of guilty than in any other way, and by so doing he aids the administration of justice and does much toward rehabilitating himself in public estimation. Scores of casual law breakers do this every year with benefit to themselves and the public generally.

Any construction of the law, which forecloses an offender of this right must necessarily be against public policy and consequently illogical and forced.

Not alone is the offender against the laws charged with a knowledge of them, but this presumption of knowledge is also a charge against those who accuse him and they too must follow the plainly marked path, and a grand jury is bound, if an offender has committed one offense, to accuse him once and once only.

Then he may plead guilty—and accept the punishment of a man who has once offended, or he may prepare to defend himself against the single accusation.

The grand jury which returned the indictment in the case at bar saw fit to ignore the plain letter of the law as well as its spirit and to return an indictment which put Wetzel, the Plaintiff in Error, in an impossible situation, which he, by every means known to procedure, tried to correct before pleading or going to trial.

He moved to quash upon the ground that he was thrice accused of a single offense. That motion was denied.

On the 13th of December, 1912, he made a motion to compel the United States to elect as to which counts of the indictment it would proceed under. This motion was denied by being ignored.

On the 21st of September, 1914, he made the same motion and it was denied.

On the day of his trial he again urged the motion to quash and again it was denied.

On the same day he made another motion to compel an election between counts without result.

The overuling of the motions to quash and motions to compel election are assigned as error in Subs. 1, 2, 8 of Assignment of Errors (Tr. of Rec. 35-37).

Had the defendant not raised his objections to the indictment at the proper time he might not now be heard to complain. But he objected to it in every possible manner and persisted in his objections until the judgment of the Court was rendered and entered. His clamorings were quite lost in the prosecutor's vociferous assertions that the pleadings were carefully drawn, all due weight being given to the rights of the defendant.

A glance at the record will, we think, preclude the United States from claiming that the fault found by the defendant goes to the form and not the substance of the pleading, or that he was not prejudiced by its shortcomings.

We deny that the defect is one of form only, but if we should admit it to be a defect of that kind we would stand uncontradicted in our position that the defendant was wofully prejudiced.

In the first place, had he been guilty, he could not have pleaded guilty to three offenses when he had committed but one. The Government has no right to expect that of any man. In the second place he now stands convicted twice of the same offense, and had it not been that the trial Court granted a new trial upon one of the counts of which the jury had convicted him he would stand convicted of three offenses.

Thus, the United States succeeded in doing indirectly what it could not do directly, namely, convict or put in jeopardy an accused twice for the same offense. We do not believe that it will be claimed that after a conviction or acquittal on a good indictment of any of the things charged in any of the counts that the defendant could be prosecuted again upon another indictment charging the matter set up in another of the counts.

It follows undoubtedly that this defendant has been put three times in jeopardy for the one offense and another portion of the Fifth Amendment ignored.

The courts have left no doubt as to the construction of the statute under which Wetzel, the Plaintiff in Error, was convicted. This Court speaking through Judge Ross in Lee's case *(infra),* when the identical point was before it in another form settles the question. Lee, the defendant in that case, questioned the indictment on the ground of its duplicity,

claiming that two of the things that make a letter non-mailable could not be pleaded in one count, but that they should be separated into two counts. The Court said:

> "Upon the merits of the case but little need be said. The indictment does not charge two offenses. The charge relates to but a single letter alleged to have been deposited in the mails for transmission therein.
>
> *Lee* vs. *United States,* 156 Fed. 948-950.

The case is exactly in point and the question was so elemental that it was disposed of in a few words without the citation of an authority.

Indeed, no authority is necessary beyond the easy and plain language of the statute itself and there are few authorities on the point. Burton's case *(infra)* decided in the Eighth Circuit nearly a year before Lee's case, Judge Van Devanter writing the opinion, is also exactly in point. The same statute is involved as is involved in the case at bar and the learned Judge deems the question so simple that he does not refer to authorities. Burton and a co-defendant were indicted in two counts which differed in the name and address to whom the circular was mailed. The Court will note that that indictment refers to two deposits in the mail, one to one person and the second to another person. An indictment which essayed to charge two separate letters mailed contrary to law, in one count would, of course, be duplicitous. We quote from the opinion:

"The defendants conceiving that *each* count charged two distinct offenses, because the printed circular was alleged to give information as to where, how, and of whom and by what means an obscene book might be obtained, and to contain in itself obscene matter, moved that the prosecutor be required to elect upon which of the two charges he would proceed. The motion was denied and this is assigned as error. The ruling was right. Whether the circular contained one or both of the matters alleged, it was non-mailable under Section 3893 of the Revised Statutes, the latter portion of which provides for the punishment of 'any person who shall knowingly deposit or cause to be deposited, for mailing or delivery anything declared by this section to be non-mailable'. *The act charged* in each count was the mailing of a single copy of the circular, and that constituted but one offense."

Burton vs. *U. S.*, 142 Fed. 57-59.

It is the claim of the learned District Attorney that Wetzel is charged with separate offenses by each count in the indictment, not by reason of the mailing of more than one letter since only one letter is claimed, but by reason of what was contained in that one letter. It was upon this theory that Wetzel was found *thrice* guilty, not of mailing three letters but of committing three offenses by mailing *one* letter.

This was precisely the claim of counsel for Lee and Burton, and if the learned District Attorney is right in his contention in the case at bar, then Lee and Burton were condemned without due

process of law. Counsel claimed in that case that each count charged two distinct offenses because the printed circular was alleged to give information as to *where, how* and of *whom* and *by what means* an obscene book might be obtained. The District Attorney in the case at bar claims that the different counts in the indictment against Wetzel charge separate and different offenses because the single letter was alleged to give information where things adapted for producing abortion could be obtained; where an abortion would be performed; and who would perform an abortion. And Wetzel was so convicted.

The contentions of the District Attorney in the case at bar and counsel for Lee and Burton are identical; to-wit: that the offense against the statute is the prohibited character of the information conveyed and not the manner of its conveyance. As for instance, it would be two crimes to send by one letter information where *two* obscene books might be secured, or it would be two crimes to send by one letter information where an abortion might be had at two different places or by two different persons or where two abortions might be had at one place and so on into as many different parts as the ingenuity of a prosecuting attorney might be able to dissect a single circular or letter written to a single individual.

But counsel for Lee and Burton were wrong. The indictment charged two distinct offenses, not

because the printed circular gave information as to where, how and of whom and by what means an obscene book might be obtained, but because the indictment charged in *two* counts the *mailing* of *two* separate and different circulars, each giving the prohibited information. If the District Attorney in the case at bar is right in his contention then Lee and Burton could have been and should have been charged, not with *two* offenses, but with *eight* crimes; to-wit: giving information two separate times as to *where, how* and *of whom* and by *what means* an abscene book might be obtained. The absurdity seems obvious, yet it is precisely upon such a theory and in such a manner that Wetzel was indicted and convicted. Wetzel was not indicted for and convicted of mailing more than one non-mailable letter as were Lee and Burton. His alleged offense consisted of having given information in one letter to one person as to by what means, where, and by whom an abortion might be secured. That was one offense just as it was two offenses for Lee and Burton to give information by *two* letters as to how, where, by whom and by what means an obscene book might be secured.

The reading of many reported cases does not disclose to counsel any further authority than the cases cited above.

The books are full of cases in which indictments with a multiplicity of counts are analyzed, but most of these cases deal with indictments where

each count was for a distinct offense. Likewise, there are many cases dealing with duplicitous indictments. But for cases like the one at bar exhaustive search of the decisions of the Supreme Court and other Federal Courts yields us nothing.

The error of the pleader who drew the indictment against Wetzel can be accounted for only upon the theory that he misconstrued Section 1024 R. S. and relied upon the Court's stretching Section 1025 R. S. from its accepted meaning far enough to cover the carelessness.

Rumble's case *(infra)* may be of some aid to this case. It was decided by this Court, the opinion being written by Judge Hawley, and while it may have no great bearing on the merits of this case, it demonstrates that a prosecutor, by having sound consideration for the legal rights of a defendant and thus proceeding carefully and lawfully, achieves lawful results. It is the antipode of this case, where by careless and unlawful proceedings, careless and lawless results are brought about. Mr. Devlin was the United States Attorney who presented Rumble's case to the courts. By a timely election between counts and a *nolle prosequi* as to superfluous ones he relieved the Court of the necessity of seriously considering the reversal of a judgment.

Rumble vs. *United States,* 143 Fed. 772-776.

The general rule of law applicable to misjoinder of counts in an indictment is well stated in Nye's case *(infra)* and is quoted by Judge Hawley in Rumble's case *(supra)*. While neither Rumble's nor Nye's case are directly in point here, for the reason that they deal with the question of a multiplicity of offenses charged in separate counts, while this case deals with *one* offense charged a multiplicity of times in separate counts the rule may well be the same.

> "In all cases where there has been an improper number of offenses joined in an indictment the court may, in its discretion quash the indictment; but it is always addressed to the *sound* discretion of the court in cases of that character. It may in its discretion, quash the indictment, or it may permit the prosecutor to *nolle* certain counts, or it may compel the prosecutor to elect which one he will proceed upon, so that the defendant shall in no sense be prejudiced in his defense."

U. S. vs. *Nye* (C. C.) 4. Fed. 888-893.

Argument on Points Raised by Demurrer.

We do not hesitate to say that the indictment, as far as its actual substance is concerned, is the most dangerous thing of its kind that we have ever seen. Departing from the well-settled rules of criminal pleading this document perversely hides from the accused the one thing that it was necessary for him to know in order to prepare his

defense, and spreads before him in large capitals the names of two famous Americans, the one an ex-President of the United States and at the time of the return of the indictment a candidate for election to that office, and the other, the Governor of his state and a candidate for Vice-President of the United States, matter wholly unnecessary to the pleading and not only useless to the defendant, but highly prejudicial to his rights and calculated to deceive him.

Whether a grisly humor prompted the omission from the indictment of that which was necessary to it and caused the insertion of a political poster of no value to either the document or the one accused, is problematical. Perhaps it was so inserted to throw into the scales against the defendant any political prejudices that might exist in the minds of individual jurors.

Whatever may have been in the mind of the pleader when he drafted this secretive accusation with its cryptic figures and political dodgers, the United States is now unwilling to submit it to this Court without the key to and explanation of it that was refused the person whose liberty they were seeking to take by means of it. (Bill of Exceptions, Tr. of Rec. pp. 26-27.)

By the very amendment to the Bill of Exceptions proposed by the Government it admits the secretiveness of the indictment, for otherwise why should it put into a Bill of Exceptions a newspaper advertise-

ment and a letter, which in the trial was offered against the defendant, the introduction and reception of which in evidence only the defendant could have complained of, objected or excepted to.

Unquestionably this is an attempt to explain the indictment in this Court after a continuous refusal to explain it to the person most interested in it, he whom they sought to condemn.

If this indictment needs no explanation why attempt to explain it here? Why give this Court the special information unless the learned counsel for the nation fear that this Court might be puzzled by its text?

Whether a guilty man would be warned by its deceptive allegations is not the question. Guilt needs no warning. It was the innocent that the Fifth Amendment sought to protect from prosecution and condemnation.

The defendant objected to it and never ceased until the hour of his condemnation in the District Court. By his demurrer he placed his objections before the Court. He claimed that the whole indictment and each of its counts did not state facts sufficient to constitute an offense against the law; that it was without any meaning whatever upon its face; that the words 938 and 100 pasted upon the political dodger were ambiguous; that it could not be ascertained whether they constituted a cryptogram or cipher or whether they were to be taken in their accepted meaning in English or not; that

for the same reasons it was facetious and frivolous, uncertain and unintelligible. (Demurrer, Tr. of Rec. 9 to 16.) After the verdict he again objected by his motion for a new trial and his motion in arrest of judgment. (Tr. of Rec. 28, 29, 30.)

The error in the overruling of the demurrer, in the denial of the motions for a new trial and to arrest the judgment are covered by Assignment of Errors 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13. (Tr. of Rec. 35 to 39.)

This condemned man does not come into this high court finding spots on a fair, although somewhat informal indictment. He comes clothed with the armor of the presumption of innocence which was stripped from him in the District Court. The document he had to face was pregnant with useless and unnecessary information, while it withheld the only matter of any consequence to the accused. It was no more than, as was once said by a learned justice of the Supreme Court, "a rule to come into court and show cause, if any he had, why he should not be hanged."

It was a trap. A bait of cryptic figures and tempting capital letters was skillfully placed before the eyes of the quarry while deep in the conscience of the pleader was the hidden trigger.

We claim that the Fifth Amendment and all the decisions of the courts from the beginning stands between an accused man and a trial under such an

indictment. It seems inconceivable that the United States should set a snare which could only be avoided by a *guilty man.*

Grimm's three cases *(infra)* put the true rule for indictments for offenses of this character squarely before a pleader. Indeed, these three cases better illustrate the difference between a good and a bad indictment than it is usually the fortune of an investigator to find and all relate to the offense against the law under consideration in the case at bar. In a case like the case at bar where Sec. 211 of the Criminal Code (Sec. 3893 R. S.) is under consideration these three cases are particularly illuminating.

In the first the opinion quotes so much of the indictment as was necessary for the Court to illustrate its point. It is remarkably like the indictment in the case at bar, though Grimm's indictment, is, as a pleading, so much superior to Wetzel's that it would only be permissible to mention them together for the reason that a demurrer to Grimm's indictment on the ground of its uncertainty was sustained. Yet the information it gave the accused was volumes compared to what was given Wetzel.

In that case the Court says:

> "The difficulty in the present case is that the pleader did not content himself with declaring the general language of the statute, even if that would have sufficed. He has set out the letters in full, and thereby thrown discredit on

the allegation that they give information where obscene pictures can be obtained. If it was deemed essential to set out the letters in full, then, as they do not on their face purport to give information such as the statute prohibits, the pleader should have set out the other extrinsic facts upon which the government relies to show that they contained information denounced by the statute."

United States vs. *Grimm,* 45 Fed. 558.

When the demurrer in that case was sustained, it is evident that another indictment was obtained containing the vital matter left out of the first. Examining the indictment in the first case, it will be seen that the Government held back a particular letter. In the second case *(infra)* the suppressed letter was set forth, the Government giving the defendant *all* that it had. No suppression and no deceit were claimed. A demurrer was overruled.

United States vs. *Grimm,* 50 Fed. 528.

In that case, the indictment is not set out in full, and it may be argued that Judge Thayer, who also decided the first case, turned about to some degree. That is not so. As in the first case he applied the law to a bad indictment, so in the second case he applied the law to a good indictment. He could have done no more or no less in either case.

But the second case went to the Supreme Court and is reported with enough of the indictment for discussion.

Grimm vs. *U. S.,* 156 U. S. 604.

As that indictment was drafted and as Grimm was warned what he would have to meet at his trial, so should the indictment in the case at bar have been drafted that Wetzel, the defendant, could have organized his defense. The letter rushed into the bill of exceptions (a doubtful place for it) should have appeared on the face of the indictment where it belonged.

In the Grimm case last cited it must be remembered that Grimm was given all the information that the Government could give, while in this case the most important matter was willfully kept from the defendant, while matter calculated to deceive was furnished lavishly.

It will be worse than useless for the Government to urge here that a letter or circular apparently and obviously obscene need not be pleaded. We admit such to be, as it should be, the law. The document rushed into the Bill of Exceptions at the last moment is not obscene and it could be pleaded by the most modest pleader, and would have been in much better taste than the spreading out in capital type of the names so arrogantly flaunted upon its face.

Suppose, however, it was of the character that required its being pleaded by reference only. Examine the indictment against Wetzel and it will seem that there is not the slightest reference to the letter which would warn or inform the defendant of its existence.

We do not cite the scores of cases which show the way that indictments in cases like the case at bar should be drawn. We have read most of them and think that not one authority exists that justifies the looseness and deceptiveness in the one now under consideration. We do not find a single case in which the United States seeks to justify an indictment so substantially defective.

Among the latest cases on the subject are the following:

Clark vs. *U. S.,* 202 Fed. 740;

Bartel vs. *U. S.,* 227 U. S. 427.

To sum up on this point we assert that not only is this indictment ambiguous and unintelligible but it fails to state facts sufficient to constitute an offense against the statute, and that this is plain upon its face; that all the explanation of it in the amendment to the Bill of Exceptions by which it is now sought to influence this Court, should have been given to the defendant, this Plaintiff in Error, if not by setting out the text of the secret letter, by a certain and unmistakable reference to it in the indictment.

Under such indictments men should not be put upon their defense. With the wide latitude given by the statute (Sec. 1025 R. S.) and with the wise and well-considered rule for the construction of the Fifth Amendment set down by the courts, no further

licence should be allowed criminal pleaders, lest innocent men suffer and guilty men escape.

For the reasons urged in this brief we believe that we have convinced this Honorable Court that the motion to quash should have been granted, but that not having been done, the United States should have been compelled to elect between the counts as to upon which it would proceed against the defendant. We also believe that the demurrer should have been sustained, upon each and all of the grounds in it set out and that it having been overruled, the motion in arrest of judgment should have been granted.

Therefore, we respectfully submit that the verdict of guilty should be set aside.

Respectfully submitted,
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